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CHIEF JUSTICE MARSHALL ON FEDERAL REGULATION OF INTERSTATE CARRIERS.

The first decision of the Supreme Court upon the Commerce Clause of the Constitution rendered over eighty years ago in the case of Gibbons against Ogden,[1] deals with a question now commonly considered a product of recent conditions,—the question as to the extent of Federal control over interstate carriers and over monopolies of interstate commerce.

The decision may, in its effect upon the structure of government, prove to be the most important of all the many cases which have been decided by that great tribunal. It has been cited and approved many times; whether cited or not, its doctrine, as that doctrine is now understood, is the accepted basis of all decisions upon the portion of the Constitution which is developing more rapidly, and is the subject of a larger number of cases, than any other.

It would be expected that a case of controlling authority, so often considered, would long ago have found its place in constitutional history; but for some reason, not readily apparent, the case has received no adequate critical examination, although recent developments,—notably in the Northern Securities Case, and in the suggestions made by the Commissioner of Corporations, on December 21st, 1904, in his first annual report—give the subject an increasing practical importance. The words of the decision have been literally applied, but no effort appears to have been made to learn its significance historically.

[1] 9 Wheat. 1.

Interstate transportation by land was, to a considerable extent, originally instituted and for many years after the adoption of the Constitution, supported by the establishment of monopolies.[1]

A hundred years ago the commerce of the country was almost entirely limited to the foreign and coasting trade. The only roads which existed led from the woods to the principal towns on navigable waters. At the commencement of the Revolution there was but one connected road from North to South [2] and this was true when the Constitution was formed.[3] "Fifty miles back from the waters of the Atlantic the country was an unbroken jungle." [4] In the vigorous phrase used by Henry Clay, "the country had scarcely any interior." [5] Turnpike roads did not come into existence until the nineteenth century.[6] Meanwhile, as the population increased and pushed further inland, a demand grew up for better means of land communication. Shay's Rebellion and the Whiskey Rebellion showed the political necessity, and commercial and social needs were even greater. Under these conditions there was but one way in which communication could be introduced. The States could not establish and operate lines of coaches, build bridges and maintain ferries. Taxation for these purposes would not have been borne. Transportation must pay for itself, and this could be accomplished only by the creation of monopolies. If persons could be found, willing to establish a service where there were no improved roads and little or no travel, it was considered good public policy to encourage the establishment of the service by giving exclusive rights. Monopolies were, therefore, granted in every direction and by every State. The Latin phrase, "*periculum privatum, utilitas publica*," which appeared on the seal

[1] State Monopolies of Inter-State Transportation, North American Review, April, 1904.

[2] Views of President Monroe on Internal Improvements enclosed in message to Congress May 4, 1822. Messages and Papers of Presidents (Richardson) Vol. 2, p. 176.

[3] Survey of Roads of the United States, Christopher Colles (N. Y. 1789).

[4] McMaster, Hist. Am. People, Vol. 1, p. 4.

[5] Speech in House of Representatives, Jan. 30, 1824. Annals 18th Congress, 1st. Sess. Vol. 1, pl. 1315.

[6] Report of Committee to House of Representatives, Feb. 1817. Annals 14th Congress, 2d Session, 929.

of the first railroad company incorporated in England, seems to have expressed the views not only of those who engaged in that particular enterprise, but also the public opinion of America, as well as of England, in regard to ventures in the way of providing transportation generally.

The leader of this movement in the Middle and Eastern States was one Levi Pease, of Shrewsbury, Massachusetts, a famous man in his day, but now as little known as are the annals of stage-coach travel. He was the sole projector of the mail stage establishment of the Federal Government, and was long engaged in superintending the various branches of the system. It is not easy at this time to learn how far his control extended, but perhaps there has been no time when the transportation interests of a large section of the country seemed to be so within the hands of a single individual, as when, in the early days of the nineteenth century, these interests of the Eastern States were in his management. Notwithstanding this fact there was no public opposition to his control, and when he died it was said that "he was rich in the affection of all who knew him."[1]

Plainly, the public, and apparently the courts, were then far from considering individual control of interstate transportation to be a ground for governmental or judicial interference.

The policy which thus built up "the immense mail stage establishments" as they were then considered[2] was not accidental, nor was it a temporary expedient. Canals and railways were built and maintained in the same way, and the policy which began in the East extended throughout the country and continued unquestioned until after the Civil War,—in some respects still continues.

An idea of the extent to which monopolies were granted may be gained from an examination of early statutes.

In New York a monopoly of stage transportation on the east bank of the Hudson was in 1785 given to an indi-

[1] Cleaveland Herald, Feb. 27, 1824. Article on Levi Pease, New England Genealogical and Historical Register, Vol. 2, p. 313. MSS. entitled "A Traveler's journal, observations, and reflections, in the Western, Middle and Eastern States of North America A.D. 1823–4," published in the National Crisis and copied in the Western Reserve Chronicle of Warren, Trumbull County, Ohio, Feb. 2, 1824.

[2] Cleaveland Herald, Feb. 27, 1824.

vidual.[1] Transportation in the Mohawk Valley seems to have taken care of itself, but in 1804 the need for better facilities west of Utica, is shown by the grant of a monopoly of stage transportation from Utica to Canandaigua,[2] and in 1807 a monopoly was granted from Canandaigua to Buffalo.[3] Thus, except the distance from Albany to Utica, the whole path now followed by the New York Central Railroad from one end of the State to the other was given by law to private monopoly. That these monopolies did not expressly operate beyond the State line is of small moment. They extended to the State line, and restricted interstate transportation to the channels which the State established for its passage.

This is true also of the monopoly which the State granted in 1798 for transportation between Lansingburgh and Hampton in Washington County, near the Vermont line, west of Rutland;[4] of the monopoly granted in 1803 for transportation between Albany and a point on the New Jersey line;[5] of the monopoly of 1811 between Schaghticoke and the Vermont line, in Washington County,[6] and of the monopoly between Champlain, in Clinton County, and the Canada line.[7] The monopoly of transportation between Catskill Landing and Unadilla which was granted in 1805[8] and renewed in 1812[9] did not extend to the State line, and may in fact have had little to do with interstate transportation, but, as a matter of law, interstate traffic passing between these points, if any such existed, was as effectually restricted as was the purely domestic traffic.

In some instances the grant of exclusive privileges was expressly made effective beyond the State line.

On March 30th, 1797, the State of New York granted to an individual the exclusive right to operate between Goshen, Orange County, and New York City. The natu-

[1] Laws 1785–1788, Ch. 52, p. 99, Act of April 4, 1785.
[2] Laws of 1804, Ch. 37, p. 137, Act of March 31st.
[3] Act of April 6th, 1807, Ch. 144, p. 186.
[4] Act of March 30th, 1798, Ch. 62, p. 224.
[5] Act of Feb. 26, 1803, Ch. 20, p. 322.
[6] Act of April 4th, 1811, Ch. 151, p. 226.
[7] Act of April 5th, 1817, Ch. 183, p. 181.
[8] Act of March 28th, 1805, Ch. 49, p. 70.
[9] Act of June 8th, 1812, Ch. 108, p. 181.

ral course of this coach would be through the Ramapo Valley, past Tuxedo and through a portion of New Jersey. The statute does not specify the route to be followed, but it excludes all competition between the two points named, and therefore covers all routes.[1] The same may be said of the monopoly granted in 1817 of transportation between Newburgh and Monticello, "on the mail route so far as the same lies within this State"[2]—apparently a rather circuitous route. What had been done in New York was also done in other States. Transportation between New York and New England was monopolized in Connecticut by that State.[3] The mail route through Vermont, between Springfield, Massachusetts, and Dartmouth College, New Hampshire, was monopolized by Vermont.[4] In the same manner the North and South lines of communication in the South were monopolized by Maryland[5] and Virginia.[6] South Carolina in 1796 established a monopoly of stage transportation between Georgetown and Charleston, and Charleston and Savannah, Georgia, reserving, however, a right to the Federal Government to run stages between the places named.[7]

In the matter of exclusive grants of ferries and bridges the States were especially liberal.

Before the decision of Gibbons *v.* Ogden and after the adoption of the Constitution, the State of Vermont granted no less than twenty-eight exclusive rights of ferriage over Lake Champlain to the New York shore, besides twenty-seven grants of exclusive rights of ferriage over waters of Lake Champlain within the limits of the State. Within the same period New York granted fourteen monopolies of ferriage over Lake Champlain to the Vermont shore, besides granting two monopolies of ferriage across the St. Law-

[1] Laws 1797–1800, Ch. 70, p. 97.

[2] Act of Feb. 14th, 1817, Ch. 35, p. 24.

[3] Perrin *v.* Sikes (Conn., 1802) 1 Day 19.

[4] Act of Oct. 31st, 1792.

[5] Act of Dec. 21st, 1790.

[6] Act of Dec. 4th, 1787, Ch. 79, p. 618; Act of Oct. 31st, 1792, Ch. 98, p. 622; Act of Dec. 21st, 1790, Ch. 62, p. 194.

[7] Act of Dec. 19, 1796, Vol. 5, Stats. S. C., p. 281; see also—Act of Dec. 17, 1808, Vol. 5, Stats. S. C., p. 580; Act of Dec. 16, 1815, Vol. 9, Stats. S. C., p. 482.

rence River to the Canada shore, and one across the Delaware River to the Pennsylvania shore.

This practice still continues with the express approval of the Supreme Court and the courts of many States.[1]

Many other statutes of this character may be cited, all at the time of undoubted validity. The subject met with early attention in Congress without drawing the suggestion from any quarter that the State laws concerned the Federal power over commerce or that their validity could be questioned on this ground.[2]

In Gibbons *v.* Ogden it was held that a monopoly granted by the State of New York of the navigation of waters of that State could not exclude others from transporting passengers and freight through the Kill-von-Kull and over the Hudson River between Elizabethtown, New Jersey, and the City of New York.

In view of the practice which had continued unquestioned for thirty-five years, the decision seems, upon first reading, a revolutionary usurpation of power by the Supreme Court. If a State may grant monopolies of ferriage, why not also of other navigation? It is not the distance traveled after crossing the line which raises the question of Federal power, but the fact of the crossing.[3] If the right of transportation across Lake Champlain can be granted as a monopoly, why not also the right of transportation across the Hudson? If a State may grant monopolies of transportation by land, why not by water?

How then was the decision in Gibbons *v.* Ogden received at the time? To what extent was it applied? Was it considered to cast doubt upon the validity of long continued practice?

A very brief examination of current writings shows that, so far from being revolutionary, the doctrine of the Court was in accord with the best public opinion of the time.[4]

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[1] Prentice & Egan, Commerce Clause, 157.

[2] Annals 2nd Cong (1792) pp, 303-309.

[3] Covington Bridge Co., *v.* Kentucky (1893) 154 U. S. 204; Gloucester Ferry Co. *v.* Pennsylvania (1884) 114 U. S. 196.

[4] Veto message of Gov. Oliver Wolcott of Connecticut, May Session, 1822, reported in Columbian Register (New Haven). See also New York National Union, March 13th, 1824; Connecticut Courant March 9th, 1824; Columbian Register April 3rd, 1824; New York American, March 5th, 1824; Delaware Gazette (Wilmington), March 19th, 1824.

The case was argued on Wednesday, Thursday, Friday and Saturday, February 4th, 5th, 6th and 7th, 1824. The decision was announced on Tuesday, March 2nd, 1824. On Friday, March 5th, the New York Evening Post reported the fact, saying:—

"This opinion, drawn up by Justice Marshall, presents one of the most powerful efforts of the human mind that has ever been displayed from the bench of any court. Many passages indicated a profoundness and forecast, in relation to the destinies of our Confederacy, peculiar to the great man who acted as the organ of the court. The Steam Boat Grant is at an end." [1]

The opinion was published by the *Evening Post* on Monday, March 8th, with the remark:—"We presume it will command the assent of every impartial mind competent to embrace such a subject." On March 27th, the Louisville Public Advertiser expressed the same view: "We not only believe the opinion of the Court to be correct; but we feel confident that, had the same case been tried by any competent tribunal, not within the State of New York, the result would have been the same."

There was nothing new in the establishment of the rule which to most modern readers seems the great achievement of the case, that Federal power over commerce is exclusive. To the extent then under consideration, it had always been so regarded. State tariffs and navigation laws were not repealed by the States which had enacted them, but upon the adoption of the Constitution they were treated as ineffective,—unconstitutional. In one instance, indeed, an agreement made by two States, for free passage of goods from one to the other was, in the absence of any legislation by Congress, repealed by one of the States, apparently upon the ground that by the Constitution this result was accomplished without legislation.[2] It is true that the States continued to enforce their own pilotage and quarantine laws, but this was expressly permitted by Federal statutes. Daniel Sheffey, of Virginia, in his argument in the House of Representatives in February 1817,[3] assumed that the Federal power over commerce was exclusive, and even

[1] To same effect, Albany Argus, March 9th, 1824.

[2] Act of North Carolina, Nov. 25, 1790, Laws 1715–1795, Ch., 377.

[3] Annals 14th Cong. 2nd Session, pl. 888.

Philip P. Barbour, then a member from the same State, although he disagreed with Sheffey's conclusions, raised no question of the correctness of this assumption.

That the Federal power was exclusive seems, however, as the subject was then regarded, to have had little relation to monopolies of transportation, and no relation whatever to land transportation and ferriage. The New York Steamboat grant, and the case of Gibbons *v.* Ogden were the subjects of widespread public interest and of many leading articles and letters, but in the whole discussion no reference was made to an effect upon other monopolies than the one involved in this case. Had it been thought possible that the decision might affect monoplies of land transportation and ferriage, some, of all those then writing on the subject, must have referred to a result which, if a possible consequence, was an obvious one.

To learn the meaning of the decision we are thrown back upon the case itself in connection with the facts of contemporary history.

Gibbons *v.* Ogden involved the validity of a law of the State of New York, giving to Livingston, Fulton and their assigns the exclusive right for a term of years to navigate the waters of that State by steamboats. This exclusive right, over part of these waters, had been assigned to Ogden. Gibbons was the owner of a vessel of more than twenty tons burden, enrolled and licensed under Federal law, for carrying on the coasting trade, between Elizabethtown in New Jersey and the City of New York, the part of the voyage within the State of New York being over waters covered, if the State law were valid, by Ogden's monopoly.

To protect this monopoly Ogden filed his bill against Gibbons in the New York State court, praying for an injunction to forbid the operation of the defendant's vessel within the closed waters of the State. This injunction being granted, and the decree affirmed by the highest court of the State, the case was brought before the Supreme Court of the United States for review.

The issues presented were recognized at the time as momentous. Over them, the States of New York, New Jersey and Connecticut were, said Attorney General Wirt,

"almost on the eve of war." Unless the dispute can be settled he said "you will have civil war."[1]

For the plaintiff in error, who had been defendant below, but one defense was presented in the pleadings. He relied on licenses granted under the Act of Congress of February 18, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade. This was his sole defense, although in argument it was also urged that the Federal power over commerce was exclusive of all State jurisdiction.

For defendant in error it was contended that the Federal statute did not grant authority to engage in the coasting trade, but like other licensing acts merely imposed restrictions upon the conduct of the trade, and furthermore that State and Federal powers over the subject were concurrent.

In considering these propositions it is important to observe closely the position taken by counsel for the appellant. Mr. Webster contended:

"That the power of Congress to regulate commerce, was complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question were regulations of commerce, in a most important particular; and affecting it in those respects, in which it was under the exclusive authority of Congress. He stated this first proposition guardedly. He did not mean to say that *all* regulations which might, in their operation, affect commerce, were exclusively in the power of Congress; but that *such power* as had been exercised in this case, did not remain with the States. Nothing was more

[1] (U. S., 1824) 9 Wheat. 1. 184–185. The newspapers of the time show much irritation in all these States, but there is little to indicate the existence of such serious apprehensions as those stated by the Attorney General. Still the situation was undoubtedly difficult and some radical counsels may be found.

"We can hardly believe it possible, that small as the State of New Jersey is, it will suffer itself to be degraded, and its rights to be trampled upon, without a struggle at least, to maintain them. We hope and trust, that the act of laying a tax on steamboat passengers passed the last winter, will be promptly and rigidly enforced, and that the legislature of New Jersey will, at their next session, adopt such other decisive measures as the interest, honour and dignity of the State require." Trenton, True American, Jan. 24, 1820. See also, New Brunswick Fredonia, April 11, 1822. Irritation over the New York monopoly seems to have been strong also in Ohio and in Vermont for Ohio imposed upon all vessels which, claiming the right to navigate the waters of New York under the laws of that State, landed passengers in Ohio, a fine of $100 for each passenger so landed,—Republican Advocat (New London, Conn.), May 1, 1822, while Vermont granted to an individual a monopoly within its limits of the right to navigate the waters of Lake Champlain,—Act of Nov. 10, 1815, Ch., 102, p. 120.

complex than commerce; and in such an age as this, no words embrace a wider field than *commercial regulation.* Almost all the business and intercourse of life may be connected, incidentally, more or less, with *commercial regulation.* But it was only necessary to apply to this part of the Constitution the well settled rules of construction.

"Some powers are holden to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the States to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the Court has adjudicated on many important questions; and the same mode is proper here. And, as some powers have been holden exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so, where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction would be, to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set upon this case under the laws of New York, is a *monopoly.* Now, he thought it very reasonable to say, that the Constitution never intended to leave with the States the power of granting monopolies, either of trade or of navigation; and, therefore, that as to this, the commercial power was exclusive in Congress."[1]

It would be difficult to find more convincing evidence of Webster's genius than the fact that in the first argument upon the commerce clause in the Supreme Court, he suggested the distinction which is now embedded in the Constitution itself. To students who have known no other construction the distinction seems inevitable, but it was not so at the time.

Even the Chief Justice in his decision of the case gave Webster's distinction no support. The doctrine of the court if accepted literally is surprising in the extent of the power claimed for the Federal government. Commerce was defined as a term of the largest import including intercourse for the purpose of trade in any and all its forms. Throughout this wide field there was to be but one sovereign. The power of commercial regulation it was held, is a whole, incapable of division, and therefore exclusive of a like power in a co-ordinate sovereignty. "The power to tax" Mr. Chief Justice Marshall said "is an instance of a power which is in its nature divisible."

"Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its

[1](U. S., 1824.) 9 Wheat 9–10.

nature, incompatible with a power in another to take what is necessary for other purposes. * * * When, then, each government exercises the power of taxation; neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. * * * It has been contended by the counsel for the appellant, that as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted.[1]

In this opinion, Mr. Justice Johnson agreed, holding that,—

"The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limit to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."[2]

On these grounds the Court announced the broad rule that the power of commercial regulation is an indivisible unit; that it is exclusively vested in Congress, and that no part of it can be exercised by a State.

At this point the limitation upon Webster's conclusion and upon the doctrine of the Court becomes conspicuous.

The framers of the Constitution, Webster says, "never intended to leave with the States the power of granting monopolies, either of trade or of navigation." Why this restriction of Federal power to navigation? Is not all interstate transportation within Federal control, and is not navigation within the control merely as one of many methods of transportation?

This doctrine,—now in some aspects, the commonplace of constitutional law—was wholly impossible in 1824. To have held that all monopolies granted by the States were illegal would have overturned established customs and

[1] pp. 199; 209. [2] p. 227.

rights of property until then unquestioned. No such effect was intended and no new doctrine was advanced. The Chief Justice spoke of his opinion as having "the tediousness inseparable from the endeavor to prove that which is already clear."[1] Mr. Justice Johnson said that the doctrine of the case had long been approved by "contemporaneous and continued assent."[2] As stated by the Court the decision, in this respect, followed Webster's argument and without reference to transportation, held that the Federal power over commerce included control of navigation.[3] To this point the decree is expressly limited.[4] No reference was there made to an exclusive Federal power to regulate intercourse. The recitals of the decree stated merely that the court was of opinion that the licenses set up by the appellant were valid, and gave full authority to navigate the waters of the United States for the purpose of carrying on the coasting trade, any State law to the contrary notwithstanding.

So far as concerns the actual ruling, the record is therefore substantially free from doubt. The case holds that navigation is within the commercial powers of Congress, and that a Federal coasting license is a sufficient authority to navigate the public waters of a State.[5]

It has been common, however, to assume that the decision went far beyond a determination of this narrow issue. It is said that the language of the opinion is unambiguous,—why then should not its words be literally accepted and applied in their natural meaning?

The answer to this question is not far to seek. The natural meaning of the words is not now what it was when the opinion was written. Within a few years after this decision the whole economic situation was changed by the introduction of railroads. Marshall could in 1824 safely frame his definition of commerce in the broadest terms, because commerce itself was a narrow operation. When easier means of intercourse brought the States closer together, even judges who sat on the bench with Marshall

[1] p. 221, [2] p. 229. [3] p. 190. [4] p. 239.

[5] Opinion of Mr. Justice Catron in License Cases (U. S. 1847) 5 How. 603. Opinion of Mr. Chief Justice Taney in Wheeling Bridge Case (U. S. 1851) 13 How. 585. Opinion of Justices Clifford, Wayne and Davis in Gilman *v.* Philadelphia (U. S. 1865) 3 Wall. 739.

differed under the new conditions, as to the meaning of the language in this case.[1]

One thing, however, is clear—the Federal power does not even yet cover all intercourse for purposes of trade, nor are the States wholly excluded from power to legislate upon the subject. Indeed, there never was a time when the doctrine of Gibbons *v.* Ogden—if the words of the opinion be literally accepted in their modern sense,—could be generally applied to actual conditions of foreign and interstate commerce, while as to commerce with the Indian tribes an entirely different rule prevailed.[2]

The decision must be read in its relation to the history of the times and the facts of the case. "No judge, in vindicating the judgment of the court, can deliver maxims of universal application in every sentence, or oracles which may be read in two ways, one applicable to the case before him, the other not. To sever the arguments of a judge from the facts of the case to which he refers will often lead to very erroneous conclusions." [3]

What, then, was "commercial intercourse" among the States as Marshall knew it? "What was the intention of the framers of the Constitution in regard to this intercourse? What were the constitutional doctrines which in 1824 had long been approved by contemporaneous and continued assent"?

Commerce in 1824 was conducted on land by horse and wagon or afoot; it was conducted on the water by navigation. Land communication at that time had no direct relation to the Federal government. Then, as now, one might walk or drive through any State without becoming conscious of Federal regulation.

With navigation conditions were different.

"Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitu-

[1] (U. S. 1847) 5 How. 604.

[2] Speech of Storrs in House of Representatives, May 15th, 1830. Cong. Deb., Vol. 6, Part 2, p. 1003; Act of N. Y., April 10th, 1813, 2 R. L. 1813, c. 92, p. 153; Act of April 12th, 1822, Laws 1822, Ch. CCV., p. 202; April 5, 1817, Laws 1816-1817, Ch. CXLII, p. 149; Speech of Senator Adams, April 20th, 1830, Cong. Deb., Vol. 6, Part 1, p. 360. House Report No. 227, 21st Congress, 1st Session.

[3] Mr. Justice Grier in the Passaic Bridges, 3 Wall. 782, 791.

tional powers and duties of the State and Federal governments. * * * Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair and management, to State regulation and control. * * * No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to National regulation."[1]

The decision in Gibbons *v.* Ogden then related solely to transportation by water; it held that navigation was within Federal control.

The intention of the framers of the Constitution in regard to this intercourse appears from the history of the Convention, and from public discussions of the period.

By the accepted rule of construction, Federal powers are exclusive of State jurisdiction in three cases only—first, when the Constitution expressly so provides; second, when the grant of power to the Union is accompanied by express prohibitions to the States; third, when the Constitution "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally repugnant."[2]

The grant of power to Congress over commerce was not in terms exclusive. Experience under the Confederation of an exclusive Federal power to regulate commerce with the Indians had taught the statesmen of that day that the power of the local governments could not safely be so restricted. The motion to make the Federal power of commercial regulation exclusive was therefore defeated in the Convention.

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[1] Railroad Company *v.* Maryland (U. S. 1874) 21 Wall 456, 470. Pullman's Car Company *v.* Twombly (1889) 29 Fed. 658, 666.

[2] Hamilton in Federalist, No. XXXII.

In place of this provision the States were therefore left free to legislate, except so far as their power was restricted by express prohibitions of the Constitution or was incompatible with the power given to the Union.

Over the express prohibitions of the Constitution little doubt has arisen. The States are forbidden to tax imports or exports; to lay duties of tonnage; to impose inspection charges for purposes of revenue; to coin money; to impair the obligation of contracts, &c. To this extent at least they could not interfere with Federal authority.

The great controversy which existed from the time the litigation arose which was terminated in Gibbons *v.* Ogden until the decision of Cooley *v.* Port Wardens[1] in 1851, was whether the State power of commercial regulation was in any way restricted by the grant of a similar power to Congress. Was the authority given to the Union "absolutely and totally repugnant" to similar authority in the States?

Hamilton's illustration of such repugnancy is in the Federal power "to establish an uniform rule of naturalization throughout the United States." Of this provision he says that it "must necessarily be exclusive; because if each State had power to prescribe a distinct rule there could not be a uniform rule."[2] Attorney-General Wirt based his argument in Gibbons *v.* Ogden upon this method of construction, saying that "regulation of that commerce which pervades the Union necessarily implies *uniformity*, and the same result, therefore, follows as if the word had been inserted" in the grant of power to Congress."[3]

Now, it is not difficult to ascertain in what respect the framers of the Constitution contemplated uniformity of commercial regulation. The subject met with the widest public discussion, and the Constitutional Convention itself was brought about by the recognized necessity of such a system. Madison's resolution in the Virginia House of Delegates and the report of the Annapolis Commissioners urged uniformity of regulation, and in the debates thus aroused the nature of the commercial powers contemplated is well defined. From these sources it appears that under a form of expression sufficiently broad to give Congress at all times power to prevent conflicting and discrim-

[1] 12 How. 299. [2] Federalist, No. XXXII. [3] p. 178.

inating State legislation, the Convention had prominently in mind the establishment of a Federal authority competent to regulate foreign relations; to control navigation; to raise a Federal revenue by means of a tariff, and to prevent the imposition of duties by particular States upon articles imported from or through other States. To this extent the Federal power of commercial regulation was undoubtedly a unit incapable of division. This was what Madison meant when he used this phrase in the Constitutional Convention,[1] and it was to regulations of this character that Monroe referred in 1822 when he said that:

"Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this constitution, equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other." [2]

When the court in 1824 held that the Federal power over commerce is indivisible it referred to operations of commerce which had always been considered within this rule. To this doctrine, and to no other, had there been contemporaneous and long continued assent. At the very time, however, that the rule was announced a distinction was made, as has been shown, between transportation and navigation,—Marshall's broad definition of commerce did not include transportation in its relation to the carrier. This is not, and at that time had never been considered as, a part of commerce.

"Commerce has a definite signification. It means the ordinary buying and selling and bartering, between the citizens of the same country, and the citizens of one country with the citizens of another country, and it means no more. Universal usage has fixed its boundaries so permanently they cannot be shaken by any artificial or sophistical argument." [3]

"Trade and commerce actually consist in buying and selling, though they may perhaps be also said to include certain necessary incidents of buying and selling, as for example, the carriage of goods bought and sold from the seller to the buyer . . . . It is only, however, in its relation

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[1] 3 Madison Papers, 1585, Smith *v.* Turner (1849) 7 How. 396.

[2] Message to Congress, May 4, 1822.

[3] Speech of William Smith, Senator from North Carolina, April 11th, 1828, Cong. Deb. Vol. IV, Part I, pl. 647.

Senator Stanford, April 26th, 1886, Vol. 17, Cong. Rec., Part 4, p. 3827.

to the buyer and seller of goods that the carriage of such goods can be said to be an incident to the buying and selling of them." [1]

The Supreme Court has apparently held this view in its decisions that the right of shipper and traveller to send goods or to go from one State to another originates not only in State law, but is a right which every citizen is entitled to exercise under the Constitution,[2] while the duty, and therefore the right of the carrier to transport goods by land from State to State before the adoption of the Interstate Commerce act, originated in State law alone.[3]

In regard to navigation other considerations controlled. John Randolph said that the proximate as well as the remote cause of the existence of the Federal Government was the necessity of a single authority which could regulate foreign commerce.[4] It was necessary, too, that the Federal Government be given authority to raise a revenue, and the accomplishment of either of these objects compelled the grant of authority to that Government to regulate navigation, both foreign and coastwise. All this appears over and over again in the writings of that period. Madison in the introduction to his report of the debates of the Constitutional Convention says:

"The want of authority in Congress to regulate commerce has produced in foreign nations, particularly in Great Britain, a monopolizing policy, injurious to the trade of the United States and destructive to their navigation; the imbecility and anticipated dissolution of the confederacy extinguishing all apprehensions of a countervailing policy on the part of the United States. The same want of a general power over commerce led to an exercise of the power, separately, by the States, which not only proved abortive, but engendered rival, conflicting, and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighboring ports, and to coerce a relaxation of the British monopoly of the West India navigation, which was attempted by Virginia, the States having ports for foreign commerce taxed and irritated the adjoining States trading through them, as New York,

[1] The Northern Securities Case by Prof. C. C. Langdell; 16 Harv. Law. Rev. 539, 544. See also decision of Judge Peter S. Grosscup, in United States *v.* Swift & Co. (1903) 122 Fed. 529, 531, 532.

[2] Crandall *v.* Nevada (U. S. 1867) 6 Wall 35; Case of the State Freight Tax (U. S. 1872) 15 Wall. 232; see Crutcher *v.* Kentucky (1890) 141 U. S. 47.

[3] Bowman *v.* Chicago, &c., Ry. Co. (1885) 115 U. S. 611, 615.

[4] Speech in House of Representatives Jan. 3, 1824, Annals 18th Cong. Vol. 1, pl. 1299.

Pennsylvania, Virginia and South Carolina. Some of the States, as Connecticut, taxed imports from others, as from those which complained in a letter to the executive of Virginia, and doubtless to those of other States. In sundry instances, as of New York, New Jersey and Maryland the navigation laws treated the citizens of other States as aliens." [1]

The only way in which the hostile legislation of other countries could be met would be by a power which could prohibit access to all the States alike or grant it as to all, as circumstances might require.[2] In the language of Adams, "if monopolies and exclusions are the only arms against monopolies and exclusions" the venture should be made. "It was a miserable policy to be forced to adopt," says Mr. Fiske, "for such restrictions upon trade inevitably cut both ways," but no other course was open.[3]

The difference in the nature of Federal control over the two branches of commerce was, therefore, that foreign commerce was to be controlled not alone for the protection of buyer and seller, but navigation itself was to be regulated. It was intended furthermore, that, so far as concerned foreign commerce and navigation, Congress should have the right to determine who could engage in these operations,—in other words, that in this field and for international purposes, Congress could establish monopolies and exclusions. The policy which Attorney-General Knox in 1902,[4] and Commissioner Garfield still more recently, advocated in regard to interstate commerce as a means of trust regulation was in fact intended by the framers of the Constitution as a means of regulating international relations,—but for international purposes only. In other relations the right of navigation does not come from the Federal Government,[5] and no Federal franchise is needed for its exercise.[6]

Interstate commerce on the other hand was viewed only from the standpoint of the trader. The "miserable policy" which, as Mr. Fiske says, Congress was "forced to adopt" in relation to foreign nations, was never considered possible in relation to the different States. The speech

[1] Madison Papers, p. 711.

[2] Curtis, Const. Hist. Vol. 1, p. 186 (2nd. ed.).

[3] Fiske, Critical Period, p. 146 (Ed. 1897).

[4] Speech at Pittsburgh, October 14th, 1902, 36 Cong. Rec. p. 413.

[5] Gibbons *v.* Ogden (U. S. 1824) 9 Wheat. 1, 211, 227.

[6] Railroad Company *v.* Maryland (U. S. 1874) 21 Wall, 456, 470.

which John Randolph made in the House of Representatives on January 30th, 1824, contains passages, treating of the difference between the powers of Congress over foreign and interstate commerce, which read almost as though intended to be an answer to Mr. Knox and Mr. Garfield.

"If, indeed," Mr. Randolph said, "we have the power which is contended for by gentlemen under that clause of the Constitution, which relates to the regulation of commerce among the several States, we may under the same power, *prohibit*, altogether the commerce between the States or any portion of the States, or we may declare that it shall be carried on only in a particular way, by a particular road, or through a particular canal; or we may say to the people of a particular district, you shall only carry your product to market through our canals, or over our roads, and then by tolls imposed upon them, we may acquire power to extend the same blessings and privileges to other districts of the country.....Sir, there is no end to the purposes that may be effected under such constructions of power.....If we" in Virginia, "should chance to encounter the displeasure of Government under this construction of power, they may say to every wagoner in North Carolina, you shall not carry on any commerce across the Virginia line in wagons and carts, because I have some other object to answer by a suppression of that trade. Are gentlemen prepared for this?" [1]

To the question there could then be but one answer. No one at that time claimed for the Federal Government the broad powers over commerce among the States which it possessed over foreign commerce and navigation. The claim is now for the first time seriously put forward, and we are now told that Congress can not only prescribe the manner in which interstate commerce may be conducted, but it may determine the qualifications which those must possess who would engage therein; that is, that Congress may confine the right to a favored class, be the class large or small. President Eliot is reported recently to have said that "one of the greatest steps forward in the contest for private and public liberty was the fight which our English ancestors made against monopolies sold or given by the King to his favorites." [2] All this work it now appears is to be undone, and the contest for private and public liberty is now to be advanced by restoring to the Government the power to grant monopolies. This we may be entirely sure was not the intention of the framers of the Constitution.

[1] Annals 18th Cong. 1st Sess. Vol. 1, pl. 1307.

[2] Address before the Quill Club: New York, December 20th, 1904.

The Federal Government not only was without power to establish monopolies of interstate transportation, but it could not even interfere with the monopolies of such transportation which were established by the States. Local self-government was the theory of the Constitution. If State monopolies were wrong, it was by the States that they should be abolished. The motion which was made in the Second Congress to permit proprietors of stages employed in carrying the mails, to carry passengers also, was lost as being beyond the power of Congress.[1]

Gibbons *v.* Ogden destroyed State monopolies of coasting navigation, but had no effect on State monopolies of interstate transportation by land, or by water when not conducted coastwise. The purpose of the Constitution was to establish "an unrestricted intercourse between the States"[2] "on the basis of equal privileges."[3] State tariffs and the conflicting and discriminating State legislation which interfered with free trade in the goods of the several States were therefore to be abolished, but, so far as concerned transportation among the States viewed from the standpoint of the carrier, the Federal power extended no further than the control of that part of it included in navigation—in other words to the coasting trade. This was involved in the regulation of foreign commerce,[4] but there were also other good reasons for giving it into national control.

"Owing to the extent of our coast, danger exists, that in conducting this trade, the revenue will be defrauded, and with a view to prevent such defrauding, the Constitution empowers Congress to "regulate" this branch of commerce. And to this the power extends and no further."[5]

This was the view also of Mr. Justice Johnson. "It is," he said, "to confer on her (a vessel) American privileges as contradistinguished from foreign; and to preserve the

[1] Annals 2nd Cong. 1792, pp. 303–309.

[2] Federalist, No. XI. (Ford, p. 69).

[3] Federalist, No. VII (Ford, p. 37).

[4] Lord *v.* S. S. Co. (1880) 102 U. S. 541.

[5] Speech of Silas Wood in House of Representatives, Jan. 15, 1824. Annals 18th Cong. 1st Sess. Val. 1, pl. 1055. See also remarks of Madison in Virginia Legislature quoted by Andrew Stevenson in House of Representatives Jan. 29, 1824, *id.* pl. 1275.

government from fraud by foreigners in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that 'this whole system is projected." [1]

Here then is the explanation of the decision in Gibbons *v.* Ogden. The State law was invalid, not because it established a monopoly of interstate transportation, but because it amounted to a regulation of the coasting trade, a subject which had wholly been confided to Congress.

This appears more fully from the course of legislation which the States pursued after this decision.

In 1848 Massachusetts granted the exclusive right to run steamboats on the Merrimac River between Haverhill and Lawrence[2] and in 1867 granted another monopoly on the same river between Mitchell's Falls, Lowell, and Lawrence.[3] In 1856 the State of Georgia granted a monopoly on the Chattahooche River.[4]

The explanation of this legislation lies in the fact that the navigation thus monopolized did not fall within the description of coasting trade, as the term was then understood.

> "We should say that 'coasting license' * * * by the very term itself is confined to the navigation of waters bordering on the seashore, and never extends to those of rivers passing from the interior of the country to the ocean."

This comment made in the New York Evening Post March 18th, 1824, represents a view then widely held.[5]

It is true, that on the 7th of April, 1824, the Attorney General of New York rendered an opinion to the Assembly in which with some hesitation he held that navigation on the Hudson River between New York and Albany fell within the Federal power to regulate the coasting trade.[6] This rule did not at once meet with general acceptance, and in any event would have no application to navigation of interior waters. Such navigation might be interstate transportation, but it was not part of the coasting trade,

[1] Gibbons *v.* Ogden, 9 Wheat 1, p. 232.

[2] Act of May 3, 1848, Ch. 249, p. 741.

[3] Act of April 1, 1867, Chap. 115, p. 546.

[4] Act of March 1, 1856, No. 211, p. 270.

[5] See National Advocate (N. Y.) March 12, 1824.

[6] Albany Argus, Friday, April 9, 1824.

and the States therefore claimed full power of regulation over it. Upon similar grounds Federal courts held that the conduct of a ferry across a navigable river, not being coasting trade, was not within Federal license laws,[1] and that the possession of a Federal coasting license did not authorize ferriage in violation of State laws.[2] For many years it was common in admitting new States into the Union to provide in the act of admission that the navigable waters within the new State should be common highways forever free to all citizens. This clause appears in the organic acts of no less than eleven States.[3] Unless the States had possessed the power which Massachusetts and Georgia claimed, such legislation on the part of the Federal Government would have been unnecessary.

The grant of monopolies of ferriage, also, not being part of the coasting trade[4] continued by the States. The number of such monopolies created in the last eighty years it is impossible to estimate, for in some States exclusive privileges of ferriage have been given upon compliance with general laws. The extent of the practice is indicated, however, by the fact that since the decision of Gibbons *v.* Ogden the State of New York has by special statutes granted twenty-two monopolies of ferriage across the State line; Vermont has granted forty-one and Pennsylvania eighty-four.

[1] United States *v.* Steamboat James Morrison (1846) 1 Newb. Adm. 241.

[2] Wiggins Ferry Co. *v.* East St. Louis (1882) 107 U. S. 365; Conway *v.* Taylor's Executor (1861) 1 Black 603; Newport *v.* Taylor's Executors (Ky. 1855) 16 B. Monroe 699; Chilvers *v.* People (1862) 11 Mich. 43; Ferry Co. *v.* Wilson (1877) 28 N. J. Eq. 537; Carroll *v.* Campbell (1891) 108 Mo. 550.

[3] *Indiana;* Act of May 7th, 1800, 2 U. S. Stat. 58; Act of April 19th, 1816, Sec. 4, 3 U. S. Stat. 289; Resolution of Dec. 11th, 1816, 3 *id.* 399. *Illinois;* Act of Feb. 3rd, 1809, 2 U. S. Stat. 514; Act of April 18th, 1818, Section 4, 3 U. S Stat. 428; Resolution of Dec. 3rd, 1818, *Id.* 536. *Mississippi;* Act of March 1st, 1817, Sec. 4, 3 U. S. Stat. 348; Resolution of Dec. 10th, 1817; *Id.* 472. *Louisiana;* Act of Feb. 20th, 1811, Sec. 3; 2 U. S. Stat. 641; Act of April 8th, 1812, *Id.* 701. *Alabama;* Act of March 2nd, 1819, Sec. 6; 3 U. S. Stat. 489; Resolution of Dec. 14th, 1819, *Id.* 608. *Missouri;* Act of March 6th, 1820, Sec. 2, 3 U. S. Stat. 545, *Iowa;* Act of March 3rd, 1845, Sec. 3, 5 U. S. Stat. 742. *Wisconsin;* Act of August 6th, 1846, Sec. 3, 9 U. S. Stat. 56. *California;* Act of Sept. 9th, 1850, Sec. 3, 9 U. S. Stat. 452. *Oregon;* Act of Feb. 14th, 1859, Sec. 2, 11 U. S. Stat. 383. *Minnesota;* Act of Feb. 26th, 1857, Sec. 2, 11 U. S. Stat. 166.

[4] U. S. *v.* Steamboat James Morrison (1846) 1 Newb. Adm. 241.

In the meantime the grant by different States of monopolies of land transportation continued unquestioned.[1] Some grants, like that made by Vermont to Levi Pease in 1792 expressly contemplated the establishment of a monopoly of interstate transportation.[2]

When the Erie Canal was built it was the policy of the State of New York to give to the canal a monopoly of the transportation of merchandise between the East and the West. For this reason when the Utica and Schenectady Railroad Company was incorporated it was expressly enacted in the charter of the company that "no property of any description, except the ordinary baggage of passengers shall be transported or carried on said road."[3]

Subsequently, that and the other roads, which now form part of the New York Central Railroad, were authorized to transport goods during the suspension of canal navigation, paying the Erie Canal Commissioners the toll which would have been required had the goods been carried on the canal.[4] In 1847, these roads were authorized to transport merchandise during the whole year, but upon payment of tolls as before.[5] The requirement of tolls was not abolished in New York until 1851[6] the very year in which Illinois imposed a similar charge upon railroads competing with the Illinois and Michigan Canal.[7] It appears from remarks made in Congress that the tolls imposed by New York rested upon transportation of grain from the Northwest and other interstate freight,[8] and this was doubtless true also of the tolls imposed by Illinois.

[1] As illustrations of this sort of legislation see: N. Y. Act of Jan. 28, 1828, c. 21, p. 14; Act of Apr. 21, 1828, c. 306, p. 399; Act Apr. 21, 1828, c. 340, p. 471; Act Apr. 17, 1829, c. 154, p. 250; Act Apr. 27, 1829, c. 276, p. 404; Act Apr. 19, 1830, c. 263, p. 288; Act Feb. 16, 1831, c. 43, p. 41; Act March 24, 1831, c. 83, p. 111.

[2] Act of N. Y. Apr. 5, 1828, Ch. 169, p. 196; Act of S. C. Dec. 19, 1835, Vol. 8, Stats. S. C. 409; Act of Ky. Feb, 29, 1836, Ch. 343, p. 426, 432.

[3] N. Y. Laws of 1833, Ch. 294, p. 462, 468.

[4] Laws of 1844, Ch. 335, p. 518, 1 Rev. Stats. N. Y. 3rd ed. p. 219 Pt. 1. Ch. IX, title 2, Sec. 40, 45.

[5] Laws of 1847, Ch. 270, p. 298.

[6] Laws of 1851, Ch. 497, p. 927.

[7] Act of Illinois, Feb. 7, 1851, Priv. Laws 1851, p. 47.

[8] Remarks of Senator Hale, Feb. 14, 1865, Cong. Globe, 38 Cong. 2nd Sess. 794.

In 1833 the State of New Jersey granted to the Camden & Amboy Railroad Company a monopoly of transportation between New York and Philadelphia.[1] This provision was sustained in the State courts.[2] In 1861 it was found that this company was unable to meet the demands for the transportation of troops and supplies, and a Government quartermaster impressed another railroad and passed over it some eighteen thousand men and four hundred tons of freight. For this the Camden & Amboy Company brought suit against the road so impressed and recovered from it the money received for this service.[3]

This monopoly aroused wide public interest and opposition at a very critical period, but there was no suggestion that it was illegal, and it was only destroyed by the passage of a Federal statute, giving all railroads operated by steam the right to carry goods and passengers from State to State.[4]

Clearly then, the right of a carrier to engage in interstate commerce was not at that time, as has recently been stated,[5] derived solely from the Federal Constitution, but was a right which a State might grant, or in some instances withhold, a rule which is in harmony with the theories of the Constitution and other decisions of the Supreme Court.[6] The rule that the Federal Government can also by statute grant the right to a carrier was then new but is now well established. The case of Gibbons *v.* Ogden was not forgotten, but was considered inapplicable to such a monopoly.

In view of this history of constitutional practice it is not difficult to ascertain the meaning of Chief Justice Marshall's decision.

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[1] Acts of N. J. 1829–30, 83 Harrison Comp. N. J. Laws (1833) 284.

[2] Camden & Amboy R. R. Cases (1862) 15 N. J. Eq. 13; (1863) 16 id. 321; (1867) 18 id. 546.

[3] See Speech of Senator Sumner, Feb. 14, 1865, Cong. Globe 38th Cong. 2nd Sess. 793; Senator Chandler, May 29, 1866, Cong. Globe, 39th Cong. 1st Sess. 2870; Senator Foot, Jan. 15, 1866, id. 227.

[4] Act of June 15, 1866, U. S. Rev. Stats. Sec. 5258.

[5] Crutcher *v.* Kentucky (1890) 141 U. S. 47.

[6] The Origin of the Right to Engage in Interstate Commerce XVII. Harv. L. Rev. 20; Gibbons *v.* Ogden (U. S. 1824) 9 Wheat 1, 211; Bowman *v.* Chicago &c. Railway Company (1885) 115 U. S. 611.

There was an open question in the early days of the Constitution whether a State might, under its powers to regulate its internal affairs, grant monopolies of navigation within its limits, or whether this was impliedly forbidden by the commerce clause. There was no doubt that by this clause power was given to Congress to raise a revenue, to regulate navigation, foreign and coastwise, and to prevent State tariffs. To this extent the Federal power appears at all times to have been considered exclusive of State jurisdiction. If the Federal power extended no further than to such matters as were obviously within this field, the power thoughout its whole scope was clearly exclusive. If the field of regulation were wider, no such radical rule could be adopted, but a construction must be found which would be capable of adaptation to varying conditions.

On the other hand, should the narrower definition be taken, the question would then arise whether the grant of such a monopoly as Ogden claimed under the laws of New York, constituted a regulation of navigation.

This latter question is the one with which the Court dealt. The decision, in tone and doctrine, therefore takes its place not as the first of the new school of liberal construction, but rather as the last announcement of the earliest school of constitutional construction. In its implied definition of commerce, it looks backward not forward—it belongs to the era of the stage coach.

There is an interesting question how far subsequent decisions have been influenced by a literal reading of the broad expressions of this case. There is little doubt that this influence has been felt, and that, in part at least, it explains the dissensions in later cases. "It has always appeared to me," said Mr. Chief Justice Taney in 1846, "that this controversy" over the meaning of the commerce clause "has arisen mainly out of that case" (Gibbons *v.* Ogden) "and this doctrine of the exclusive power of Congress in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward until after the decision of Gibbons *v.* Ogden, although it has been abundantly discussed since."[1]

[1] License Cases—Peirce *et al. v.* New Hampshire (U. S. 1847) 5 How. 581.

In 1849 Mr. Justice Woodbury said that "an expansive and roving, and absorbing construction has since" Gibbons *v.* Ogden "been attempted to be given to the grant of the power to regulate commerce, apparently never thought of at the time it was introduced into the Constitution."[1] Notwithstanding these protests, the tendency of the Supreme Court has been to give to the opinion in Gibbons *v.* Ogden as literal an application as under new conditions was possible. To this effort,—in some degree,—is owing the decision of Cooley *v.* Port Wardens in 1851,—the case which at last established Webster's,—not Marshall's,—rule for the construction of Federal commercial powers. This, it is now said, "may be considered as expressing the final judgment of the court."[2]

This rule has, however, brought its own difficulties. Not only is the decision a departure from the intention of the Constitution, but it is also a departure from legal principles.

The question whether or not a given subject admits of but one uniform system of regulation, is a legislative question, except in cases, like Gibbons *v.* Ogden, for instance, so clear that the legislature cannot legitimately supersede the judicial determination. The rule in Cooley *v.* Port Wardens, is not, however, so restricted but holds that in all matters which demand a single uniform rule,—or as the doctrine is broadened by later cases, in all matters which admit of a single uniform rule,—the silence of Congress is equivalent to a declaration that commerce shall be free. Upon this subject Professor Thayer remarks that—

"If it be said . . . that the courts have merely been construing the silence and non-action of Congress, as being a declaration that no rule is required, and enforcing that, we do not really escape from the difficulty just mentioned. As regards State regulations of commerce in matters which do not require uniformity of rule, it is admitted that the silence of Congress is not conclusive against them; some positive intervention of Congress is required. If, then, the courts would know in any given case of a regulation of commerce what the silence of Congress means, how are they to tell unless they first determine under which head the given regulation belongs, that of regulations requiring a uniform rule, or of those which do not? . . . It may then be conjectured that the decisions of the Federal

[1] Passenger Cases (U. S. 1849) 7 How. 558

[2] Mobile *v.* Kimball (1880) 102 U. S. 691, 702.

courts are likely to incline as time goes on, to the side of leaving it to Congress to check such legislation of the States as may be challenged on the ground now in question, and of limiting its own action in respect to such cases to that class of State enactments which are so clearly unconstitutional that no consent of Congress could help the matter out." [1]

In other words, the effort which the Court made in Cooley *v.* Port Wardens to find a field in which Mr. Chief Justice Marshall's decision could literally be applied, involves in Professor Thayer's opinion logical difficulties from which in time the court will incline to retreat.

The important consideration which the decision in Cooley *v.* Port Wardens presents, is not, however, in the question whether its rule will prove to be "the final judgment of the Court" but in the opportunity which it offered for wide extension of the Federal power.

Before this decision interstate carriers were within the power of Congress only in their relation to shippers and travellers. As carriers merely, Congress had no power over them.

"Congress," Mr. Justice Grier said, "has the exclusive power to regulate commerce; but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges and railroads, are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them." [2]

It was not long, however, before the influence of the Civil War began to make itself felt in expanding the Federal jurisdiction, so that when in 1870 the Court asserted the power of Congress over a vessel operating within the limits of a single State, expressions such as those employed by Mr. Justice Grier were avoided, and the question of Federal control over carriers by land was expressly reserved. "The present case," the Court said, "relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation." [3]

The widening of Federal authority over commerce appears again in the expressions of the Court in the cases of

[1] Cases on Const. Law 2190–2191.

[2] The Passaic Bridges (U. S. 1865) 3 Wall. p. 792.

[3] The Daniel Ball (U. S. 1870) 10 Wall. 557, 566.

The State Freight Tax[1] and the State Tax on Gross Receipts[2] decided in 1872, although the actual rulings in both cases were consistent with early theories. In the first case a State tax on every ton of freight carried in Pennsylvania was declared unconstitutional, while in the second a tax upon the carrier of a certain sum for every dollar received was upheld,—the difference being that the first tax fell directly upon the shipper, while the second fell but indirectly upon the shipper and directly on the carrier. So far as the Federal Government was concerned the amount which the carrier might charge for transportation was not a subject of regulation. We concede, the Court said, "the right of the owners of artificial highways . . . to exact what they please for the use of their ways."[3]

In 1874 the Court stated this proposition more emphatically.

"This unlimited right of the State to charge, or to authorize others to charge toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—a sovereign—discretion, and its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those, who, for the time being, are officially invested with it In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally."[4]

Federal control of interstate carriers as such, and from the standpoint of the carrier, has therefore grown from small beginnings to its present extent since the date of these cases. It has, however, at all times been understood that the primary relation of the carrier is to the State in which it operates. Federal control relates directly to but one of its functions and to the carrier only because of, and in respect to, its exercise of that function. Amid all changes therefore this one rule has always stood unquestioned and unquestionable, that matters relating to the ownership of

[1] (U. S. 1872) 15 Wall. 232.
[2] (U. S. 1872) 15 Wall. 294.
[3] (U. S. 1872) 15 Wall. 277.
[4] Railroad Company *v.* Maryland (U. S. 1874) 21 Wall. 456, 471.

facilities of transportation have been exclusively within State jurisdiction. State monopolies of transportation were as legal in 1866 when the Federal statute was passed to enable other railroads to compete with the Camden & Amboy Railroad Company, as in 1789, when the Constitution was adopted.

The whole subject of ownership—including the right of competing lines to consolidate—was in 1895, when the case of Louisville and Nashville R. R. *v.* Kentucky,[1] was decided as completely within State control and beyond the Federal jurisdiction as when Vermont, in 1792, gave Levi Pease sole use of the mail route in that State for Connecticut Valley traffic, or when South Carolina in establishing a monopoly of transportation between Charleston and Savannah gave to the Federal Government express authority to establish a competing line.

It is in this respect that the decision in the Northern Securities case makes a complete break from the rules which have controlled the decisions of the Supreme Court, the practice of Congress, and the conduct of States and individuals during the whole period which has elapsed since the adoption of the Constitution.

The report of the Commissioner of Corporations goes however far beyond any expressions of this case. Following suggestions previously made by the Industrial Commission, and by Mr. Knox, he urges that the Federal Government deny the right to engage in interstate commerce, to all corporations, except such as shall voluntarily comply with Federal requirements as to corporate organization and management. A similar suggestion as to Federal powers was made on April 22nd, 1886,[2] during the debate on the Interstate Commerce Act. The Senate then refused to take the suggestion seriously and the consideration of the subject ended with the statement that the reply made to this suggestion, "undoubtedly demolished the proposition." Such a claim of authority as that now made by Mr. Garfield gives new force to Randolph's remark,—"Sir, there is no end to the purposes that may be effected under such

[1] (1895) 161 U. S. 677, 702.

[2] Cong. Rec. 49th Cong. 1st Sess. Vol. 17 Part 4 pp. 3721–3725.

constructions of power," to which should be added the statement that, "In proportion as the General Government encroaches upon the rights of the States, in the same proportion does it impair its own power and detract from its ability to fulfill the purposes of its creation."[1]

E. PARMALEE PRENTICE.

[1] Jackson, Second Inaugural Address.